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Accents Painting and Wallcovering, Limited and Accents Contracting, LLC and District Council No. 21, International Union of Painters and Allied Trades. Case 04-CA-081641

September 26, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondents have failed to file an answer to the complaint. Upon a charge filed on May 23, 2012, by District Council No. 21, International Union of Painters and Allied Trades (the Union), the Acting General Counsel issued a complaint and notice of hearing on July 25, 2012, against Accents Painting and Wallcovering, Limited (Respondent Painting) and Accents Contracting, LLC (Respondent Contracting) (collectively, the Respondents), alleging that they have violated Section 8(a)(5) and (1) of the Act. The Respondents failed to file an answer.

On August 17, 2012, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on August 17, 2012, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondents filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was received on or before August 8, 2012, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the Acting General Counsel's motion disclose that the Region, by letter dated August 9, 2012, notified the Respondents that unless an answer was received by August 16, a motion for default judgment would be filed. Nevertheless, the Respondents failed to file an answer.

In the absence of good cause being shown for the failure to file an answer or a response to the Notice to Show Cause, we deem the allegations in the complaint to be

admitted as true, and we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, until about April 1, 2012, Respondent Painting, a limited liability corporation with an office in Mountain Top, Pennsylvania (the facility), has been engaged in performing commercial and residential painting services. During the 12-month period ending April 1, 2012, Respondent Painting, in conducting its business operations described above, performed services valued in excess of \$50,000 for enterprises within the Commonwealth of Pennsylvania, including Hershey Medical Center, which enterprises are directly engaged in interstate commerce.

At all material times, Respondent Contracting, a limited liability corporation with an office at the facility, has been engaged in performing commercial and residential painting service and other services. At all material times, Respondent Contracting, in conducting its business operations described above, performed services valued in excess of \$50,000 for enterprises within the Commonwealth of Pennsylvania, including Hershey Medical Center, which enterprises are directly engaged in interstate commerce.

We find that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

At all material times, the Respondents have been affiliated business enterprises with common or substantially identical officers, ownership, directors, management, supervision, business purposes, operations, equipment and customers; have administered a common labor policy; have shared common premises and facilities; have provided services for each other; have interchanged personnel with each other; have commingled finances; and have held themselves out to the public as a single-integrated business enterprise.

In February 2012, Respondent Painting expanded the services performed by Respondent Contracting to convert it into a disguised continuation of Respondent Painting.

Based on their operations and conduct described above, Respondent Painting and Respondent Contracting have constituted alter egos, and have been a single-integrated business enterprise and single employer within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondents within the meaning of Section 2(11) of the Act and agents of the Respondents within the meaning of Section 2(13) of the Act:

Jennifer Phillips -	President of Respondent Painting
Kenneth Phillips -	Vice President/Project Manager of Respondent Painting Member/Owner of Respondent Contracting

The following employees of the Respondents, the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All painters, decorators, wall-coverers, drywall finishers, glaziers and apprentices employed by Respondents.

About May 1, 2009, Respondent Painting and the Union executed a collective-bargaining agreement (the original Agreement), that had been negotiated and executed by the Union and P.D.C.A. of Northeast, PA, an employer association. The original Agreement was effective by its terms from May 1, 2009 through April 30, 2012, and was subject to renewal from year to year unless either party notified the other party in writing, at least 60 days prior to the expiration of the original Agreement or any renewed Agreement, of its desire to modify or terminate the original Agreement or any renewed Agreement.

The Respondents have, at all material times, been engaged in the building and construction industry, and they have granted recognition to the Union as the exclusive collective-bargaining representative of the unit without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. Such recognition has been embodied in successive collective-bargaining agreements, the most recent, via renewal, being effective from May 1, 2012 to April 30, 2013 (the current Agreement).

For the period from May 1, 2009 to April 30, 2013, based on Section 9(a) of the Act, the Union has been, and continues to be, the limited exclusive collective-bargaining representative of the unit.¹

¹ The complaint alleges that the Respondents are construction industry employers and that they granted recognition to the Union without regard to whether the Union had established majority status. Accordingly, we find that the relationship was entered into pursuant to Sec.

About March 17, 2012, the Union, by letter with an enclosed questionnaire, requested that Respondent Painting furnish the Union with information relevant to the relationship between Respondent Painting and Respondent Contracting. The information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

Since about March 17, 2012, the Respondents have failed and refused to provide the Union with the information requested by it as described above.

Article 3 of the current Agreement requires the Respondents to make periodic payments of dues to the Union.

Article 13 of the current Agreement requires the Respondents to make periodic payments to the following funds: (1) I.U.P.A.T. District Council Welfare Fund (Welfare Fund); (2) I.U.P.A.T. Union and Industry National Pension Fund (Pension Fund); (3) I.U.P.A.T. District Council 71 Annuity Fund (Annuity Fund); (4) District Council No. 71 Vacation Fund (Vacation Fund); (5) District Council 21 Apprenticeship Training and Journeyman Education Fund (Training Fund); (6) National Apprenticeship Fund (Apprenticeship Fund); and (7) District Council 21 Scholarship Fund (Scholarship Fund).

The subjects set forth above relate to wages, hours and other terms and conditions of employment of the unit and are mandatory subjects of bargaining.

Since about November 24, 2011, the Respondents have failed to continue in effect the terms and conditions of the unit as required by Articles 3 and 13 of the current Agreement by failing to make the periodic payments to the Union, and to the Welfare, Pension, Annuity, Vacation, Training, Apprenticeship, and Scholarship Funds.

The Respondents engaged in the conduct described above without prior notice to the Union, without affording the Union the opportunity to bargain with respect to the Respondents' conduct, and without the Union's consent.

Since about February 2012, the Respondents have failed and refused to abide by the terms of the current Agreement requiring the employment of unit employees to perform unit work, and with respect to Article 9.1 concerning the subletting of contracts.

8(f) of the Act and that the Union is therefore the limited 9(a) representative of the unit employees for the period covered by the contract. See, e.g., *A.S.B. Cloture, Ltd.*, 313 NLRB 1012 fn. 2 (1994), citing *Electri-Tech, Inc.*, 306 NLRB 707 fn. 2 (1992), and *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf'd sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

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Since about February 2012, the Respondents have failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

CONCLUSION OF LAW

By the conduct described above the Respondents have been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act. The Respondents' unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents have violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union, and by failing to abide by the terms and conditions of the current Agreement, we shall order the Respondents to recognize and bargain with the Union as the limited exclusive collective-bargaining representative of the employees in the unit, and to honor the current Agreement and any automatic renewal or extension of it. In particular, we shall order the Respondents to abide by the terms of the current Agreement requiring the employment of unit employees to perform unit work, and with respect to Article 9.1 concerning the subletting of contracts. We shall also order the Respondents to make their unit employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondents' unlawful conduct. Such amounts shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1171 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

In addition, having found that the Respondents have failed, since about November 24, 2011, to make periodic payments to the Union, and to the Welfare, Pension, Annuity, Vacation, Training, Apprenticeship, and Scholarship Funds, as required by Articles 3 and 13 of the current Agreement, we shall order the Respondents to make all contractually-required contributions to the Union and the Funds that have not been made, including any additional amounts due the funds, as set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

Further, the Respondents shall reimburse unit employees for any expenses ensuing from their failure to make any required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981),² such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally, having found that the Respondents have violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with information that is necessary and relevant to its role as the exclusive collective-bargaining representative of the unit employees, we shall order the Respondents to furnish the Union with the information it requested in its letter on March 17, 2012.

ORDER

The National Labor Relations Board orders that the Respondents, Accents Painting and Wallcovering, Limited and Accents Contracting, LLC, Mountain Top, Pennsylvania, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain collectively and in good faith with District Council No. 21, International Union of Painters and Allied Trades as the limited exclusive collective-bargaining representative of the employees in the following unit during the term of the current Agreement, effective May 1, 2012 to April 30, 2013, and any automatic renewal or extension of it:

All painters, decorators, wall-coverers, drywall finishers, glaziers and apprentices employed by Respondents.

(b) Failing and refusing to continue in effect all of the terms and conditions of the current Agreement, and any automatic renewal or extension of it, including by failing to make periodic payments to the Union, and to the Welfare, Pension, Annuity, Vacation, Training, Apprenticeship and Scholarship Funds as required by Articles 3 and 13; and by failing and refusing to abide by the terms of the current Agreement requiring the employment of unit employees to perform unit work and with respect to Article 9.1 concerning the subletting of contracts.

(c) Failing and refusing to furnish the Union with requested information that is necessary for and relevant to

² To the extent an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondents' delinquent contributions during the period of the delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a set off to the amount that the Respondents otherwise owes to the fund.

the performance of its duties as the limited exclusive collective-bargaining representative of the employees in the unit.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain in good faith with District Council No. 21, International Union of Painters and Allied Trades as the limited exclusive collective-bargaining representative of the unit employees and honor and comply with the terms and conditions of the current Agreement and any automatic extensions to it.

(b) Make whole the unit employees for any loss of earnings or other benefits they may have suffered as a result of their failure to comply with the provisions of the current Agreement, in the manner set forth in the remedy section of this decision.

(c) Make all contractually-required periodic payments to the Union and to the benefit funds that have not been made since November 24, 2011, and reimburse unit employees for any expenses ensuing from their failure to make the required payments, as set forth in the remedy section of this decision.

(d) Furnish the Union with the information it requested on March 17, 2012.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Mountain Top, Pennsylvania, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically,

such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed their facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since November 24, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. September 26, 2012

Mark Gaston Pearce	Chairman
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Richard F. Griffin, Jr.,	Member
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Sharon Block,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain collectively and in good faith with District Council No. 21, International Union of Painters and Allied Trades as the exclusive collective-bargaining representative of our employees in the following unit during the term of our current agreement and any automatic renewal or extension of it:

All painters, decorators, wall-coverers, drywall finishers, glaziers and apprentices employed by us.

WE WILL NOT fail and refuse to continue in effect all of the terms and conditions of the current agreement, and any automatic renewal or extension of it, including by failing to make periodic payments to the Union, and to

the Welfare, Pension, Annuity, Vacation, Training, Apprenticeship and Scholarship Funds as required by Articles 3 and 13; and by failing and refusing to abide by the terms of the current Agreement requiring the employment of unit employees to perform unit work and with respect to Article 9.1 concerning the subletting of contracts.

WE WILL NOT fail and refuse to furnish the Union with requested information that is necessary for and relevant to the performance of its duties as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL NOT, on request, recognize and bargain in good faith with the Union as the limited exclusive collective-bargaining representative of the employees in the unit, and WE WILL honor and comply with the terms of the current agreement, and any automatic extensions of it.

WE WILL make our unit employees whole for any loss of earnings or other benefits they may have suffered as a result of our unlawful conduct, with interest.

WE WILL make all contractually-required periodic payments to the Union and to the benefit funds that have not been made since November 24, 2011 and reimburse unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL furnish the Union with the information it requested on March 17, 2012.

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LIMITED AND ACCENTS CONTRACTING